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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses	)	WT Docket No. 97-82

To: The Commission

COMMENTS

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TABLE OF CONTENTS

Page No.

SUMMARY

Through the FCC's C block restructuring order, the Commission has conferred substantial debt relief to C block broadband Personal Communications Services ("PCS") licensees. However, this relief is accomplished only to the detriment of certain small businesses, like Carolina PCS I Limited Partnership ("CPCSI"), who have technically defaulted on their payment obligations to the Commission. Moreover, the FCC's proposed C block reauction rules further prejudices these small businesses because the proposed procedures do not allow for installment payments.

The lack of installment payments in the reauction will result in lower bids and devalue those C block licenses held by original auction participants. This is because in the original C block auction, bidders were able to use the installment payments to "leverage" their dollars in order to bid higher amounts. As a result of the lower reauction bids, as well as a lack of financing from the private capital markets, a devaluation of the C block licenses will occur. This result prejudices small businesses who have defaulted on their winning bids in the original auction because they are liable for the difference between the amounts bid in the original auction and the reauction. Accordingly, the Commission must offer installment payments to qualifying bidders in the reauction, or in the alternative, must specify that defaulting entities are not liable for any shortfall.

Furthermore, the FCC's decision to eliminate installment payments is inconsistent with Congress' mandate to ensure that small businesses will be able to meaningfully participate in the wireless marketplace. Congress passed the Omnibus Reconciliation Act of 1993 which required the FCC to promote economic opportunity and competition through the competitive bidding process by disseminating licenses to designated entities. The Commission has previously

determined that installment payments would be an extremely useful tool which would enable designated entities, like small businesses, who traditionally have had difficulty in obtaining adequate private financing, to participate in the provision of wireless telecommunications. The Commission's decision not to allow installment payments thwarts this Congressional mandate and will ensure that small businesses will not be able to meaningfully participate in the provision of spectrum-based telecommunications due to lack of adequate financing.

The Commission must not unjustly penalize participants who are in technical default of the C block auction rules that are no longer in effect. It is inequitable for the Commission to conduct an auction under one set of rules, and then change those rules so that one class of bidders is benefitted to the detriment of another. At a minimum, the Commission must maintain consistency within the basic framework of an auction in order to assure that no parties in an auction are unduly prejudiced.

The FCC has also proposed that the reauction include all PCS C block licenses currently held by the Commission as a result of previous default. CPCSI requests that the Commission clarify its proposal because it does not specifically address whether licenses that are currently the subject of petitions will be included in the reauction. Such licenses should be withheld from the reauction because the "cloud" on their title further depresses their value.

Finally, the Commission requested comment on whether entities that have defaulted on their payment obligations could participate in the reauction. The Commission should allow participation by defaulting entities because they are no different than licensees that elect to take advantage of the Commission's debt relief options. Both types of entities have technically defaulted on payment to the Commission, and it is not possible to draw any meaningful distinction in the financial qualifications of these parties.

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On October 16, 1997, the Federal Communications Commission ("FCC" or "Commission") released a Second Report and Order and Further Notice of Proposed Rulemaking ("Second R&O" and "FNPRM") in which the FCC adopted various financial restructuring options for licensees in the C block broadband Personal Communications Services ("PCS"), and requested comments on proposed rules applicable to the resulting reauction of C block licenses.[1] The Commission sought comments on, among other things, proposed reauction procedures and eligibility requirements for participation in the reauction. Carolina PCS I Limited Partnership ("CPCSI"),[2] by its attorneys, hereby submits its comments in response to the FNPRM issued in

[1] In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 97-82, released October 16, 1997.

[2] CPCSI was the high bidder for nine (9) BTAs in the Commission's C block broadband PCS auction, and submitted its first down payment for these licenses in a timely manner. On September 24, 1996, CPCSI filed its request for waiver of Section 24.711(a)(2) of the Commission's rules, and supplemented that request on October 4, 1996. The FCC subsequently denied CPCSI's waiver request on April 28, 1997. Order No. DA 97-890. On May 28, 1997, CPCSI filed an Application for Review of the Commission's Order denying CPCSI's waiver request. CPCSI's Application for Review remains pending before the Commission.

the above-captioned proceeding. Specifically, CPCSI urges that the Commission: (1) adopt reauction procedures which do not prejudice the rights of participants in the original C block auction; (2) clarify that the licenses won by CPCSI will not be offered in the upcoming reauction; and (3) allow entities that have defaulted on payments to the FCC to participate in the reauction. In the alternative, equity mandates that if the CPCSI licenses are reauctioned, that CPCSI not be held liable for any shortfall between the reauction bid and CPCSI's bid.

I. REAUCTION PROCEDURES

A. The Lack of Installment Payments in the C Block Reauction Will Result in Lower Bids and Devalue Spectrum Won by the Original C Block Participants.

In the original C block auction, the Commission concluded that an installment payment plan designed for small businesses was essential to "give designated entities an opportunity to participate in the provision of spectrum-based services."[3] The FCC further stated that the need to "enhance market competition, and encourage prompt service to the public far out-weigh[ed] the additional financial burden" installment payments for designated entities would create for potential bidders. Id. ¶ 43. Accordingly, the FCC instituted an installment payment plan for all bidders in the original C block auction, and the auction garnered total winning bids in excess of $10 billion.

The tremendous difference in the amount bid in the C block auction on a per-person per-MHz basis, when compared to the other broadband PCS auctions, can largely be attributed to the availability of installment payments to the participants in the C block auction.[4] Because

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[3] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order, PP Docket No. 93-253, ¶ 40 (1995).

[4] The C block auction resulted in an average bid price of $1.33 per-person per-MHz, which is more than twice the amount bid per-person per-MHz in the A and B block broadband PCS auction, and more than four times the amount bid per-person per-MHz in the D, E, and F

installment payments were available in the C block auction, participants adjusted their bidding strategies to account for the fact that the entire winning bid could be spread out over a ten (10) year period, rather than being due at the conclusion of the auction.

The Commission has tentatively concluded, however, that an installment payment program will not be offered in the C block reauction.[5] This critical change in the auction procedures fundamentally alters the landscape of the entire bidding process. Instead of proceeding in a manner which gives primary consideration to markets gained, with secondary consideration given to the amount bid (as in the original C block auction), bidders will approach the reauction more conservatively in order to maximize the strategic value of the bids placed given that their dollars are no longer "leveraged" through the use of installment payments. As a result, lower overall per-person/per-MHz bids will be realized in the reauction because of the Commission's withdrawal of the installment payment option. Consequently, participants in the original C block auction will be unfairly penalized, as further explained below, because their rights and interests in their licenses will be adversely affected by the resulting lower bids. Therefore, the Commission must offer installment payments in the reauction to prevent a devaluation of the licenses obtained by the original C block participants.

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block broadband PCS auction. FCC Report to Congress on Spectrum Auctions, Report, WT Docket No. 97-150, p.10, released October 9, 1997. Although installment payments were available to designated entities in the F block, the Commission only set aside one-third the amount of spectrum for the F block as compared to the C block, and consequently, the bids in this auction were substantially lower than those placed in the C block auction. CPCSI's bid, when viewed under a net present value analysis, is comparable to the average A and B block auction bids.

[5] Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Report and Order and Further Notice of Proposed Rule Making, WT Docket No. 97-82, ¶ 101, released October 16, 1997.

As the Commission is well aware, C block licensees have encountered various financial difficulties with respect to payments to the FCC, as well as with the build-out of their wireless systems. Devaluation of the C block licenses will further compound these problems because the lower license values which will result in the reauction will adversely affect the licensees' ability to obtain favorable future financing.[6] A C block licensee whose financing is tied to the value of its licenses will be harmed by the Commission's proposed reauction procedures because the anticipated money to be received from such arrangements will no longer be sufficient for them to go forward with their business plans without cut-backs in their operations. Lenders and investors will be justifiably reluctant to provide capital to an entity whose license values can change drastically due to subsequent policy changes at the Commission. Licensees cannot be reasonably expected to conduct business aggressively in a competitive market like wireless telephony if the value of their most valuable assets ebbs and flows with the changes in Commission policy. Accordingly, the FCC must continue to offer installment payments to avoid the adverse effects substantially lower winning license bids in the C block reauction will have on the value of licenses currently held by winners in the original auction.

[6] Marketplace changes are partly responsible for the devaluation of spectrum held by C block licensees. For example, since the close of the initial C block auction, the Commission has auctioned the D, E and F block spectrum; the A and B block licensees have benefited from a two year head start on building their networks; bidders obtained WCS spectrum at spectacularly low prices; the second and third largest C block licensees have filed for bankruptcy; and the announcement of future auctions threatens to glut the market for spectrum. Now, the Commission's proposal to reauction spectrum without installments further exacerbates the devaluation. The greatest harm of this proposal falls on those responsible entities that have progressed with their build out, and relied on the Commission's existing rules. Moreover, the lack of financing will further reduce the amounts bid in the C block reauction.

B. Elimination of Installment Payments is Inconsistent with the Congressional Mandate to Ensure the Meaningful Participation of Small Businesses in the Wireless Marketplace.

In 1993, Congress passed the Omnibus Reconciliation Act which required that the Commission provide opportunities for small businesses and businesses owned by minorities and/or women, otherwise known as designated entities, to participate in the provision of wireless telecommunication services.[7] Congress required the Commission to, among other things, promote economic opportunity and competition through the competitive bidding process by disseminating licenses to these designated entities. See 47 C.F.R. § 309(j) (1997). The FCC determined that in order to implement Congress' directive, it would provide small businesses with certain incentives so that such entities would be able to participate meaningfully in the auction process. These incentives included an installment payment plan which would allow designated entities to pay for their licenses over an extended period of time. In reaching its decision to offer designated entities installment payments, the FCC stated that:

> In light of the expected substantial capital required to acquire and construct broadband PCS licenses, . . . installment payments are an appropriate measure for most businesses that obtain broadband PCS licenses in the entrepreneurs' blocks. . . . Given the enormous costs of broadband PCS and the likelihood of very large participants in the other blocks, this option is fully consistent with the congressional intent in enacting Section 309(j)(4)(A) to avoid a competitive bidding program that has the effect of favoring incumbent providers of other communications services, with established revenue streams, over smaller entities.[8]

Moreover, the Commission has stated that "installment payments [would] provide a significant means for small businesses to overcome their main barrier to entry: lack of access to

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[7] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387-389 (1993) (adopting 47 U.S.C. §§ 309(j)(3)(B), 309(j)(4)(D)).

[8] In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, ¶ 136, 75 RR 2d 859, 9 FCC Rcd 5532 (1994).

financing."[9] Financing has been very difficult for many C block licensees to secure due to, among other things, the lack of confidence on the part of lenders and investors in the C block itself. The FCC indicated that it was aware of this possibility when it stated, in pertinent part, that:

> [S]mall entities . . . are likely to have difficulty obtaining adequate private financing . . . Moreover, because of the problems associated with using a FCC license as collateral for a loan, small, start-up companies' access to capital markets in order to obtain a license and construct their facilities may be even more difficult. As a result, installment payments will be an effective way to efficiently promote the participation of small businesses in the provision of spectrum-based telecommunications service and an effective tool for efficiently distributing licenses and services among geographic areas.[10]

The FCC has determined on several occasions that by offering installment payments to designated entities, it was furthering the Congressional mandate to ensure that such entities would be given the opportunity to participate in the provision of spectrum-based telecommunications services.[11] Instead of advancing the original goal of assisting entities who are "likely to have difficulty obtaining adequate financing," the Commission now proposes to eliminate a valuable tool which has allowed such entities to, in this case, participate and win licenses in the C block auction. This will effectively deny all but the largest entities and incumbent providers, who are already well financed and generate revenue, from participating in

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[9] In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, <u>Third Report and Order</u>, ¶ 70, 75 RR 2d 230, 9 FCC Rcd 2941 (1994).

[10] In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, <u>Second Report and Order</u>, ¶ 233, 75 RR 2d 1, 59 FR 22980 (1994).

[11] <u>See</u>, <u>e.g.</u>, In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, <u>Second Memorandum Order and Opinion</u>, 75 RR 2d 1178, 9 FCC Rcd 7245 (1994).

the FCC's competitive bidding process. The Commission's decision to withdraw the installment payment option from designated entities fails to advance the Congressionally mandated goal of "promoting economic opportunity and competition . . . by disseminating licenses" to small businesses, 47 U.S.C. § 309(j)(3)(B) (1997). Rather, this ensures that small businesses will not be able to participate in the C block reauction and the provision of spectrum-based telecommunications due to, as the Commission has so astutely observed, lack of adequate financing.

C. The Commission Must Not Unjustly Penalize Participants Who Are in Technical Default of C Block Auction Rules That Are No Longer in Effect.

The Commission's rules state that winning bidders who default on their payment obligations are subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission, plus an additional penalty equal to three percent (3%) of the subsequent winning bid. 47 C.F.R. § 24.704 (1997). In order to avoid prejudicing participants in the original C block auction who, like CPCSI, may be subject to certain penalties for default, the FCC must offer installment payments in the reauction. The reauction must be structured such that defaulting entities are not held responsible and unjustly penalized as a result of Commission policy changes that are completely unrelated to the underlying reason for default.[12]

[12] It is important to note that the Commission received comparable winning bids in the reauction of BDPCS, Inc's ("BDPCS's") licenses. BDPCS's cumulative total net bid price for the seventeen (17) markets it won in the original C block auction, which allowed for installment payments, was $ 873,783,913. See In the matter of BDPCS, Inc.; BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block C, Order, FCC No. DA 97-1066, released May 21, 1997. In the reauction of BDPCS's licenses, however, the installment payment option was once again made available to designated entities, and the total net bid for BDPCS's licenses was $ 864,425,019. See Public

All participants in the original auction have relied on the same set of rules and procedures throughout the course of the entire auction process. It is grossly inequitable for the Commission to conduct an auction under one set of conditions, change these conditions such that certain parties are detrimentally affected – in this case, defaulting bidders in the C block auction – and then expect the defaulting bidders to make-up the difference in price.[13] The defaulting bidders will, in effect, be subsidizing the participants in the reauction so that the Commission can grant relief to entities who overextended themselves in the original C block auction. It is unfair, and legally unsupportable, for the FCC to extract additional payment from defaulting bidders in order to furnish relief to certain large C block licensees.[14] This is an unwarranted imposition of yet another penalty upon entities who can least afford to pay for the Commission's change in auction procedures. The Commission must maintain consistency within the basic framework of the rules for a particular auction in order to assure that none of the parties that participated in the original auction are unduly prejudiced, as well as to maintain the integrity of the auction process.

Notice, FCC No. DA 96-1153, released July 17, 1996. This is only one percent (1%) less than the net amount bid for these licenses in the original auction, which was made possible through, among other things, the availability to designated entities of the installment payment program.

[13] Significantly, defaulting winning bidders will be liable for the difference in the bid amounts between the original auction and the reauction, while winning bidders who avail themselves of the restructuring relief options are absolved of making up any shortfall on reauction.

[14] See also, In the Matter of Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B016, B072, B091, B147, B177, B178, B312, B335 and B436, Application for Review, Order No. DA 97-890, filed May 28, 1997.

II. LICENSES TO BE REAUCTIONED

In the FNPRM, the FCC proposed that the reauction include, among other spectrum, all PCS C block licenses currently held by the Commission as a result of previous default. FNPRM ¶ 83. It is important to note that the Commission did not specifically address whether the reauction would also encompass licenses, such as those won by CPCSI, that are currently the subject of petitions pending before the Commission. The FCC must address this issue before going forward with the reauction in order to resolve any ambiguities with regard to the status of these licenses, and to avoid the inequitable treatment of certain winning bidders in the original C block auction.

As the Commission is aware, on May 28, 1997, CPCSI filed an Application for Review ("Application") of the FCC's decision denying CPCSI's Petition for Waiver of Section 24.711(a)(2) of the Commission's rules.[15] The FCC has not yet ruled on of CPCSI's Application, and may very well decide to reinstate CPCSI's licenses. If the Commission does not rule on CPCSI's Application prior to the reauction, a "cloud" on the title of any licenses covered under the Application would exist should these licenses be offered in the reauction. The effect of this "cloud" would be to further depress the value of these licenses on reauction, as compared to licenses on which no "cloud" exists. This unfairly prejudices CPCSI further because under the Commission's proposal, CPCSI would remain liable for any deficit, even though its "clouded" licenses are less valuable than "unclouded" licenses because of the pending

[15] Section 24.711(a)(2) states that "[e]ach winning bidder shall make a down payment equal to ten percent of its winning bid (less applicable bidding credits); a winning bidder shall bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five business days after the auction closes, and the remainder of the down payment (five percent) shall be paid within five business days after the application required by § 24.809(b) is granted." 47 C.F.R. § 24.711(a)(2) (1997).

appeal and resultant uncertainty for any reauction bidder acquiring these licenses subject to the outcome of CPCSI's appeal. Accordingly, the Commission must either delay the reauction, or withdraw CPCSI's licenses from the reauction until a decision is rendered on CPCSI's Application for Review.

III. ELIGIBILITY FOR PARTICIPATION

In the Second R&O, the Commission stated that all entrepreneurs, all entities that applied for the original C block auction, and all current C block licensees (with certain exceptions), are eligible to bid in the reauction. Second R&O ¶ 22. However, the FCC did not rule on the eligibility of entities that have defaulted on their payment obligations to the Commission, and requested comments on this issue. FNPRM ¶ 84. CPCSI submits that the Commission should allow winning bidders who have defaulted on their payments in the original C block auction to participate in the reauction.

For entities having difficulty meeting their payment obligations to the FCC, the Commission has concluded that licensees may elect from one of three options in order to receive some limited relief from their financial burdens. Second R&O ¶ 6. Licensees that elect one of these three options will be able to "walk away" from the portion of the debt obligations they are unable to fulfill, and continue forward with a "clean slate." In addition, they will be able to participate in the reauction without having to demonstrate additional financial qualifications or rebut a presumption that they are not financially qualified,[16] which are proposed requirements for

[16] While licensees that elect one of the three relief options offered by the FCC will be able to participate in the reauction, there are certain limitations on the licenses they may acquire. See Second R&O ¶ 6.

entities that wish to participate in the reauction but have defaulted on prior payments for FCC licenses or authorizations.

Entities that have defaulted on FCC payments are similar to the licensees that elect to take advantage of the Commission's debt relief options in that both parties are unable to meet their financial obligations to the FCC. Neither party is more financially qualified than the other. The difference here is simply that of timing. Entities that elect the relief options are those that were able to "stay afloat" until the FCC's grant of relief. Entities that defaulted were those unable to make payments before the Commission's Second R&O. In any event, both parties are currently unable to pay for the licenses they won in the original C block auction, and there is no reasonable basis for treating such entities differently.[17]

The FCC should not penalize a party by banning it from participating in the reauction if its financial qualifications are similar to those who are allowed to bid in the reauction. The Commission's proposed financial requirements are too vague, and have the potential to discriminate between parties who are similarly situated. For example, the Commission's proposal to require a defaulting entity to submit a higher upfront payment amount is not indicative of the entity's ability to make future payments. In another example, if a defaulting entity is a winning bidder in the reauction, the Commission proposes to review a defaulting entity's financial qualifications in an expedited hearing. The FCC has not promulgated any rules with regard to the standards it will use to judge a defaulting entity's financial qualifications, and

[17] Ironically, CPCSI has not sought to restructure or walk away from its C block debt; rather, it has sought reinstatement to allow it to meet its full C block obligation. It is wholly inappropriate to punish one entity in technical violation of a rule which has been subsequently changed and to preclude that party from fulfilling its full C block obligation, while subsequently changing rules to prevent defaults by other parties seeking to avoid their financial obligations to the FCC and absolving those parties of further penalties.

this has the potential to discriminate against similarly situated entities. Moreover, requiring financial showings will result in regulatory inefficiencies which will impede the dissemination of licenses, and discourage investment in and rapid deployment of new technologies and services to the public. The FCC's auction rules already contain provisions that efficiently and effectively discourage entities who are not serious bidders from participating in an auction, and entities that wish to participate in the reauction should be allowed to do so by submitting the appropriate initial upfront payment. See, e.g., 47 C.F.R. § 24.704 (1997).

IV. CONCLUSION

Accordingly, for the foregoing reasons, CPCSI urges that the Commission allow installment payments in the C block reauction so as not to prejudice participants in the original C block auction, and to further the Congressional mandate of ensuring the meaningful participation of small businesses in the wireless marketplace. Moreover, if the Commission proceeds with a reauction, the CPCSI licenses should be withheld from that reauction. Because all entities who avail themselves of restructuring relief are breaching the rules in effect at the time of the C block auction, there is no appreciable difference between entities affording themselves of restructuring relief and other entities that are in technical default of the Commission's original C block rules. Accordingly, CPCSI further urges that the Commission permit such defaulting entities to fully participate in the C block reauction without additional demonstration of financial qualification.

Respectfully submitted,

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